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JURISDICTIONAL STATEMENT

This appeal is from a judgment of the Circuit Court of Jackson County, Missouri, denying the biological mother's Amended Motion For Leave to Withdraw Consent to Termination of Parental Rights and Adoption. The Court of Appeals reversed and remanded, *In Re Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005). The trial court, on remand, denied the biological mother's motion. The Court of Appeals affirmed, *In Re Baby Girl P.,* 2006 WL 8440. This Court sustained the biological mother's application for transfer on April 6, 2006 and assumed jurisdiction. Mo. Const. Art. V, §10; Mo. Sup. Ct. R. 83.05.

STATEMENT OF FACTS

E.P., The Biological Mother

At the time of the events in question, the biological mother, E.P., was twenty-nine years old. She was born in Guatemala. (Legal File "LF", 4, 7, Transcript "TR" 234). She has spent over six years living in the United States. (TR 235). She is the mother of a five year old son from a previous relationship. (LF 9). E.P. is employed and supports herself and her son. (TR 155, 156 and 286). She properly enrolled her son in school. (TR 297-298). She obtained a driver's license after passing a driver's

test. (TR 292). She owns her own car, which she purchased at an auction. (TR 299). She drives her car and uses it to help meet her needs and get places. (TR 297). E.P. rented an apartment. (TR 291). E.P. does have some understanding of the English language. When asked by the trial court how much the babysitter for her son costs, E.P. responded in English, without waiting for the interpreter to translate. (TR 376).

E.P.'s Plan for the Adoption of Her Child

E.P. discovered she was pregnant in October, 2003. (TR 4). She was surprised to learn she was pregnant because the biological father told her he had an operation so she could not become pregnant. (TR 7). When she told the biological father she was pregnant, he stated he didn't care what she did with the baby. He told her to "sell it, give it away, keep it, whatever you want to do." (TR 7). He left her on Halloween night in 2003. (TR 6). E.P. believes that he returned to Mexico. (TR 7, 9).

E.P. sought and obtained pre-natal care at Truman Medical Center. (TR 296-297). In November, 2003, seven months prior to the child's birth, E.P. told the hospital social worker that she wanted to have her child adopted. (TR 363). The social worker discussed this with her, with the aid of a hospital interpreter. E.P. repeatedly told the hospital social worker that she wanted to have her child adopted.

(TR 243). The hospital social worker assisted her in contacting an adoption agency, Adoption of Babies and Children ("ABC") to assist her with her adoption plan. (TR 99, 151). Each time the hospital social worker spoke with E.P., the hospital interpreter was present and interpreted the conversations. (TR 240).

E.P. was introduced to Catherine Welch of ABC, the agency's birthparent coordinator, on April 9, 2004. (TR 99, LF 6). Ms. Welch knew some Spanish words. (TR 101). At all times during conversations between Ms. Welch and E.P., an interpreter was present and interpreted for E.P. (TR 101). Ms. Welch met with E.P. to discuss her adoption plan on at least seven different occasions, six of which occurred before the baby was born. (TR 101, 157). During these meetings, E.P. never wavered in her intent and desire to have the child adopted. (TR 157-158). Never during any of these meetings did the interpreter tell Ms. Welch that E.P. did not understand what was being said. (TR 155).

Ms. Welch explained to E.P. the general process whereby a child who is placed for adoption goes in to a temporary foster home until temporary custody has been granted to the prospective adoptive parents. (TR 117-118). Ms. Welch also explained to E.P., at the very first meeting with her, that an attorney would be provided to her or she could find her own attorney, whose fees would be paid by the

agency. (TR 109-110).

Before meeting with Ms. Welch, E.P. sought out on her own a couple to adopt the baby. (TR 19-21, 159-160). E.P., sometime in March or April, 2004, however, decided she did not want that couple to adopt the child. (TR 19-21,159). She changed her mind regarding the first couple she brought to ABC because she was concerned that couple would not provide adequately for the child. (TR 21). E.P. asked ABC to help her find another couple to adopt the child, as she still wanted to make an adoption plan. (TR 159). ABC presented respondents A.M. and L.M.'s ("Art and Lisa") adoption profile to E.P., which consisted of photographs and a detailed letter about themselves and their motivation to adopt a child. (TR 159).

E.P. was provided with a written translation of the letter. The letter was translated into Spanish and provided to E.P. She expressed her desire to meet Art and Lisa to decide if she wanted them to adopt her child. (TR 160-161).

At E.P.'s request, Art and Lisa met her at the hospital in May, 2004. (TR 161). Ms. Welch was present, along with the hospital interpreter. E.P. informed them that she wanted Art and Lisa to adopt her child. (TR 159-160).

E.P. wanted Art and Lisa to accompany her on her next doctor appointment, where a sonogram would be done. (TR 161). She requested that Lisa join her in the

examination room for the sonogram, which Lisa did. (TR 161).

The Child's Birth

On June 9, 2004, at 1:33 a.m., Baby Girl P. was born to E.P. (LF 3). E.P. expressed to Ms. Welch, through the interpreter, the guidelines and parameters she wanted Art and Lisa to adhere to during her hospital stay. She did not want to spend time with the baby in her room but wanted to see the baby directly after birth. (TR 153, 162). She also wanted Lisa and Art to visit the baby in the hospital. At first, she did not want to see them at the hospital but then changed her mind. She wanted to see them after they saw the baby, to see how excited they were. (TR 162). Both the agency and Lisa and Art complied with her requests. (TR 162).

E.P.'s Meeting With Her Attorney

On June 11, 2004, more than 48 hours after Baby Girl P.'s birth, E.P. met with her attorney, Kevin Kenney, Esq. at his office. (TR 249). Catherine Welch drove E.P. to the meeting, at E.P.'s request. (TR 162). E.P. had previously been advised by Ms. Welch of her right to have an attorney represent her and that ABC would work with her if she had already selected another attorney. (TR 109-110). She was never told that she could only have an English speaking attorney. Also, she was never told that she could not have a Spanish speaking attorney, including if she

had already selected a Spanish speaking attorney to represent her (TR 110).

Kevin Kenney met with his client, E.P., with the assistance of an interpreter, Enedina Garza Wilbers. (TR 201). The interpreter explained to E.P. that Mr. Kenney was her attorney, her “abogado”, which is the term commonly used for attorney in the Spanish language. (TR 228 and 250). The interpreter was present during the meeting at all times. (TR 220-221).

During the meeting, Ms. Welch took E.P.’s 5 year old son out to the waiting room, leaving the interpreter, E.P. and Mr. Kenney alone. (TR 202, 203). During the meeting with Mr. Kenney, they discussed E.P.’s desire to have her parental rights terminated and to consent to the adoption of her child. (TR 204, 220).

Mr. Kenney reviewed the consent form with E.P., which was read in Spanish to E.P. by the interpreter. (TR 222). E.P. stated to the interpreter that she understood the consent form after it was translated to her. (TR 222, 252). E.P., after reviewing the form with Mr. Kenney, with the aid of the interpreter, then signed the consent. (TR 9-11, 17-18, 251-252).

Mr. Kenney gave his business card to E.P. and told her, through the interpreter, that she should contact the interpreter if she had any questions and wanted to speak with him. (TR 94, 214, 220). The interpreter also provided her contact information to E.P. (TR 195). The interpreter told E.P. to contact her if she

wanted to speak with Mr. Kenney. (TR 220).

Consent Hearing

On June 18, 2004, a hearing was held before the family court commissioner, in Jackson County Circuit Court, Family Court Division regarding E.P.'s consent. (TR 2-22). Present at the hearing before the family court commissioner were E.P., her attorney, Kevin Kenney, Esq., Catherine Welch of ABC, and an interpreter, Cecilia Abbey. (TR 2).

E.P. was sworn and a direct examination was conducted by her attorney. He asked her if she knew she was in a courtroom. (TR 2-3). E.P. answered "Yes." (TR 3). She answered affirmatively when asked if she understood that the law of the State of Missouri would apply and that she was waiving any claim that the law of the country of Guatemala might apply to the case. (TR 3). She indicated that she understood she was asking the Court to approve her consent to the adoption of her child and that her rights as the mother of the child would be terminated if the consent was approved by the Judge. (TR 4, 13).

E.P. testified that the termination of her parental rights and consent to adoption was what she wanted. (TR 4, 13). She gave her reasoning for wanting to terminate her parental rights and place the child for adoption as she did not want the

baby with her. (TR 4). She testified that her decision to place the child for adoption occurred "from the moment I knew that I was pregnant and the father was not supporting me." (TR 41). E.P. had not planned on having another child. (TR 236). The biological father of the child left her on October 31, 2003, to raise the child alone and went back to Mexico. (TR 7). She considered having an abortion. She ultimately decided against abortion and decided on adoption for the child. (TR 7). She testified that she had not received any promises of payment of rent, utilities, car payments or any other monies from Art and Lisa. (LF 3, TR 11-12).

The family court commissioner conducted extensive questioning of E.P. He asked her many questions to ascertain her understanding of the proceedings, her rights and her wishes regarding her rights. (TR 13-18). He asked her if she needed a written translation of the consent document that she had signed. (LF 3-5, TR 13). E.P. responded that she did not need a written translation. (TR 13).

The family court commissioner asked E.P. if she wanted to consult an attorney who spoke Spanish. (TR 14). He told her that the court would find her an attorney who spoke Spanish if she desired. (TR 14). She testified that she did not want a Spanish-speaking attorney as she could communicate fine with her present attorney. (TR 14). The family court commissioner also advised E.P. that she could have more time to think about her decision. (TR 14). He informed her that even

though she had signed the consent, she was not bound by it, and could change her mind. (TR 15). He asked her several times if she wanted him to accept the consent or if she wanted to take it back or withdraw it. Each time she responded that she wanted him to accept it. (TR 13, 15-17).

The family court commissioner advised E.P. that she was not bound by the Consent until he accepted it and until it was accepted by the judge. (TR 16). E.P. testified that she understood that, but still wanted him to accept her consent. (TR 16). The family court commissioner advised her that there might even be a possibility that the couple she selected to adopt the child, Art and Lisa, would not be allowed to adopt the child. (TR 16). She asked why they might not be approved as the adoptive couple. (TR 16). The commissioner explained to her that the trial court had to act in the best interests of the child. (TR 16-17). E.P. indicated she was okay with the possible selection of another adoptive couple "[a]s long as it's not a African-American couple or an Arab couple." (TR 17). E.P. testified that she understood the court proceedings and that she did not have any questions for the court. (TR 17-18, 21-22).

E.P., after the conclusion of her direct examination by her attorney and the court, volunteered additional, unprompted testimony regarding her desire to

terminate her parental rights to the child and consent to an adoption. During the direct examination of Catherine Welch, the next witness at the June 18, 2004, hearing, E.P. interrupted to add that her brother "is the one who didn't want me to give the baby up for adoption." (TR 18). Though her brother did not want the baby given up for adoption, E.P. stated that it was still her intent to do so. (TR 18). She gave no indication to the trial court at anytime during the June 18, 2004, hearing that she did not want to go through with the termination of her parental rights and consent to adoption of the minor child. (TR 2-4, 9-18).

The family court commissioner entered findings and recommendations accepting and approving E.P.'s consent. (LF 17-18). On June 22, 2004, the family court judge, Circuit Court of Jackson County, Family Court Division, entered his Order and Judgment adopting and confirming the family court commissioner's findings and recommendations (LF 19-20).

Events After June 18, 2004

E.P. testified that after the June 18th hearing she was distraught and made contact with ABC in an attempt to indicate that she wished to withdraw her consent. (TR 264-265). E.P., however, appeared fine and pleasant, not distraught, to Catherine Welch when Ms. Welch drove E.P. home from the June 18, 2004, hearing. (TR 197).

Ms. Welch testified that E.P. called her on Saturday, June 19, 2004. She was speaking in Spanish, and said something about her brother being angry about the adoption and said something about the baby. (TR 129). Ms. Welch told E.P. that she was sorry she could not understand her. She told her that the agency would have an interpreter call her on the following Monday. (TR 129). Ms. Welch was not going to be in the office on Monday, June 21, so she called ABC's director to explain to her that an interpreter was needed. (TR 134). E.P. called Ms. Welch again on Monday, June 21. The conversation was very brief. Ms. Welch told her that Iberty Gedeon, a bilingual therapist, would be calling her that afternoon. (TR 142). During the telephone conversations on June 19 and June 21, at no time did Ms. Welch tell E.P. that it was too late and that she could not get her baby back. (TR 192). They did not discuss the court or the judge in either of these telephone conversations. (TR 192-193).

Ms. Welch further testified that, in other adoptions cases, she often heard from biological mothers after the consent hearing, who were upset and distraught, but who did not desire to withdraw their consent to the adoption. (TR 150).

E.P. never contacted the interpreter, Enedina Garza Wilbers, who was present with her at the meeting with her attorney, Kevin Kenney, for the purpose of asking

her assistance in contacting her attorney. (TR 219-220). E.P. did call Ms. Wilbers on June 21, 2004, and asked her to call her back. Ms. Wilbers did so. They talked about the baby. E.P. did not ask her assistance in getting her baby back nor did she tell Ms. Wilbers she wanted her baby back. (TR 212, 217-218). On June 23, 2004, the day after the family court judge entered the judgment accepting her consent, E.P. contacted Ms. Wilbers to ask her to contact Mr. Kenney for the purpose of obtaining a copy of the consent papers she had executed on June 11, 2004. (TR 277). E.P. never told Ms. Wilbers that she wanted to withdraw her consent to the adoption. (TR 217-218). Iberty Gedeon, the bilingual therapist, was not certain of the date when she first talked to Catherine Welch about E.P. (TR 58, 62). She could not recall when she was first told that E.P. had given birth. (TR 57). Ms. Gedeon could not recall if she talked to Ms. Welch or to another worker at the agency on June 21. (TR 57-62). Ms. Gedeon was also uncertain of when she first talked to the agency's director about E.P. In response to questions from the trial court regarding when she spoke to the agency director, Ms. Gedeon responded: "Yeah. I just cannot remember exactly. I do know that we have very good communication. I cannot be telling you, like it happened this time, the day." (TR 68).

Ms. Gedeon testified that her conversations with E.P. were about what kind of support, as a therapist, that she could provide to E.P.. (TR 63, 71, 77-78). Ms.

Gedeon testified that during her telephone conversation with E.P. on June 21, 2005, E.P. stated one time that she wanted her baby back. (TR 63). Ms. Gedeon was also uncertain of what she told E.P. during her telephone conversations with her. Ms. Gedeon first testified that she told E.P. on June 22, 2004, in a telephone conversation, that there was nothing that could be done because the judge had already signed. (TR 67). Later in her testimony, Ms. Gedeon testified that she never told E.P. on June 21 or 22 that there was nothing more she could do. (TR 71).

Ms. Gedeon testified that she told E.P. that she should seek legal counsel from Legal Aid if she wanted to see if there was anything further she could do. (TR 74-79). Ms. Gedeon suggested the Legal Aid office to E.P. because she knew that office to have Spanish-speaking attorneys. (TR 85). Ms. Wilbers, upon questioning by the trial court, testified that there were several publications readily available and free to the public, in Spanish, that had numerous advertisements for Spanish-speaking attorneys. (TR 229-230).

Judith Abisaab, an employee at E.P.'s son's school, also testified. She testified that on Monday, June 21, 2004, E.P. told her she had a baby and gave the baby up for adoption, and felt guilty. (TR 41). Ms. Abisaab testified that E.P. told her that she wanted her baby back. (TR 42). Ms. Abisaab was not affiliated in any

way with the court nor ABC, the adoption agency.

There was no evidence that E.P. contacted or attempted to contact her attorney from June 19-22, 2004. There was also no evidence that E.P. contacted or attempted to contact the trial court from June 19-22, 2004.

Procedural History

On June 22, 2004, the findings and recommendations of the family court commissioner, wherein he accepted and approved E.P.'s consent, were adopted as the judgment of the court by Judge Gray. (LF 19-20). On July 2, 2004, ten days after her consent was accepted and approved by the family court judge, E.P. filed her Motion to Withdraw Consent to Termination of Parental Rights and Adoption. (LF 23). On the morning of trial, July 29, 2004, E.P. filed her Amended Motion to Withdraw Consent to Termination of Parental Rights and Adoption. (LF 39-42; TR 32).

On July 29, 2004, and July 30, 2004, the family court commissioner conducted an extensive hearing on E.P.'s Amended Motion to Withdraw Consent. (TR 23). E.P., at the July 29-30, 2004 hearing on her Amended Motion to Revoke Consent, testified under oath that her previous testimony before the Court on June 18, 2004, was untruthful, but then denied any intention to deceive the Court on June 18, 2004, by such untruthful testimony. (TR 259-260).

On August 2, 2004, the family court commissioner issued his Findings and Recommendations that there was no "substantial or credible evidence" of "fraud, mistake, misrepresentation, duress, duress due to 'force of circumstances'[,] inadvertence, surprise, excusable neglect, misconduct by an adverse party, coercion or good cause" that "would entitle the mother to the relief requested [of revoking her consent]." (LF 47). The family court commissioner also entered his finding that the mother "did not execute a withdrawal of consent prior to the entry of judgment on June 22, 2004". (LF 48). The Findings and Recommendations were adopted by the family court judge, Circuit Court of Jackson County, Missouri, Family Court Division on August 2, 2004.

E.P. appealed. On April 12, 2005, the Missouri Court of Appeals, Western District, issued its opinion, *In Re Baby Girl P.*, 159 S.W.3d 862 (Mo. App. 2005). The court reversed and remanded the case to the trial court. The court opined that RSMo §453.030.7 contains no direction to a birth parent as to how to go about withdrawing the written consent or to whom notice of such withdrawal is to be directed. The court held that the trial court made an error of law by concluding that RSMo §453.030.7 required a withdrawal of consent be in writing. The court stated the "case must be remanded to determine whether, under the circumstances of this

case, E.P. orally communicated a withdrawal of consent under §453.030.7 before the trial court accepted her previously given consent." 159 S.W.3d at 865.

On May 12, 2005, on remand, the trial court heard oral argument from the parties. On June 6, 2005, the trial court issued its Findings and Recommendations For Facts and Conclusions of Law, wherein the trial court denied E.P.'s amended motion. The family court judge entered a judgment adopting and confirming the commissioner's findings and recommendations. (Supplemental Legal File "SLF" , 9-20).

The trial court made extensive findings of fact. The trial court found that E.P. was capable of meeting her needs and her son's, handles adult responsibilities and functions well in the United States. (SLF 10). The trial court noted that the court had presided over hundreds of adoption cases. The trial court noted that it was common for a biological mother to feel sad, upset and distraught after giving her consent to an adoption, but that did not necessarily mean that the biological mother wanted to withdraw her consent to the adoption. (SLF 14).

The trial court found E.P. not credible. (SLF 15). The trial court also found not credible the testimony of Iberty Gedeon and Judith Abisaab. (SLF 15).

The trial court found Catherine Welch's testimony credible. The trial court also found credible Enedina Garza Wilbers' testimony. (SLF 15).

The trial court concluded that the overwhelming weight of the substantial, competent and credible evidence established that E.P. failed to effectively communicate an oral withdrawal of her consent under §453.030.7, prior to its acceptance by the judge. (SLF 15-16). The trial court also concluded that E.P. failed to establish any other grounds that would allow her to withdraw her consent to the adoption, including but not limited to fraud, mistake, misrepresentation, duress, duress due to "force of circumstances", inadvertence, surprise, excusable neglect, misconduct by any party, coercion or good cause. (SLF 16).

E.P. filed a motion for rehearing which was denied. She filed her Notice of Appeal on July 1, 2005. (SLF 32). On January 3, 2006, the Court of Appeals affirmed the trial court's decision. *In Re Baby Girl P.*, 2006 WL 8440. The Court of Appeals denied E.P.'s application for transfer to this Court. This Court granted E.P.'s application for transfer on April 6, 2006.

POINTS RELIED ON

1. The trial court correctly denied E.P.'s amended motion to withdraw her consent because E.P. lacks standing to challenge RSMo § 453.030.7 and the consent form as unconstitutional on due process grounds in that (a) E.P. cannot raise this claim for the first time before this Court and (b)

E.P. was afforded due process because she was represented by her own attorney, was provided with an interpreter throughout the process, and testified in court that she understood the proceedings, understood the consent form and the consequences of her signing the consent, and understood that she could withdraw her consent before it was accepted by the court.

In the Interest of H.L.L., 179 S.W.3d 894 (Mo. banc 2005)

R.J.J. v. Shineman, 658 S.W.2d 910 (Mo. App. 1983)

Miller v. Police Retirement System of St. Louis, 296 S.W. 2d 78 (Mo. 1956)

2. The trial court correctly denied E.P.'s amended motion to withdraw her consent because E.P. did not timely withdraw her consent in writing in that E.P. did not provide written notice of her alleged withdrawal of her consent until well after her consent was reviewed and accepted by an Article V judge.

In the Interest of K.L.S., 119 S.W.3d 548 (Mo. App. 2003)

In Re the Adoption of Davis, 285 S.W.2d 35 (Mo. App. 1955)

3. The trial court correctly denied E.P.'s amended motion to withdraw her consent because extrajudicial notifications of withdrawal of consent are invalid in that E.P. submitted her written consent to the trial court so it had to be withdrawn from the trial court, not from the child-placing

agency or any other third party.

In the Matter of Lauless, 216 Or. 188, 338 P.2d 660 (1959)

Stubbs v. Weathersby, 320 Or. 620, 892 P.2d 991 (1995)

McCulley v. Bone, 160 Or. App. 24, 979 P.2d 779 (1999)

Black's Law Dictionary (8th ed.) - Definitions of withdraw and withdrawal

4. The trial court correctly denied E.P.'s amended motion to withdraw her consent because E.P. did not timely withdraw her consent in that E.P. failed to orally communicate a withdrawal of her consent under RSMo §453.030.7 before her consent was accepted and approved by the family court judge.

Milligan v. Helmstetter, 15 S.W.3d 15 (Mo. App. 2000)

In Re the Adoption of H.M.C., 11 S.W.3d 81 (Mo. App. 2000)

5. The trial court correctly denied E.P.'s amended motion to withdraw her consent because the substantial, credible evidence before the trial court established that E.P.'s consent was given free of duress and not due to duress by "force of circumstances" in that E.P. was provided with numerous procedural protections throughout the process, including the assistance of an interpreter, independent legal counsel, and a hearing before the trial court

where she testified that she understood the proceedings, understood the consent and the consequences thereof, declined to have a Spanish speaking attorney or to have the consent document translated in writing, and wanted the Court to accept her consent.

In Interest of D.C.C., 935 S.W.2d 657 (Mo. App. 1996)

In Interest of D.C.C., 971 S.W.2d 843 (Mo. App. 1998)

In Re the Adoption of A.D.A., 789 S.W.2d 842 (Mo. App. 1990)

Scott v. Pulley, 705 S.W.2d 666 (Tenn. App. 1986)

6. The trial court correctly denied E.P.'s amended motion to withdraw her consent because the substantial, credible evidence established that E.P.'s consent to the adoption was not obtained through misrepresentation and "good cause" was not established to allow E.P. to withdraw her consent in that the trial court concluded there was no credible evidence that E.P. was subjected to any misrepresentation that prevented her from timely withdrawing her consent and the credible evidence established that her consent was given knowingly, freely and voluntarily.

In Interest of D.C.C., 971 S.W.2d 843 (Mo. App. 1988)

In Re the Adoption of A.D.A., 789 S.W.2d 842 (Mo. App. 1990)

In Re the Adoption of R.V.H., 824 S.W.2d 28 (Mo. App. 1991)

7. The trial correctly denied E.P.'s amended motion to withdraw her consent because she did not establish any grounds to justify the withdrawal of her consent and it is not in the child's best interests to allow E.P. to withdraw her consent in that the child is entitled to stability and the denial of E.P's motion promotes the goals set forth in RSMo §453.005(1).

In Interest of D.C.C., 971 S.W.2d 843 (Mo. App. 1988)

In Re Baby Girl, 850 S.W.2d 64 (Mo. banc 1993)

R.S.M.O. §453.005(1)

ARGUMENT

1. The trial court correctly denied E.P.'s amended motion to withdraw her consent because E.P. lacks standing to challenge RSMo §453.030.7 and the consent form as unconstitutional on due process grounds in that (a) E.P. cannot raise this claim for the first time before this Court and (b) E.P. was afforded due process because she was represented by her own attorney, was provided with an interpreter throughout the process, and testified in court that she understood the proceedings, understood the consent form and the consequences of her signing the consent, and understood that she could withdraw her consent before it was accepted by the court.

Standard of Review

In a court-tried case such as this, the judgment of the court must be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32(Mo. 1976). In a court-tried case, the trial court's decision is presumed correct and the appellant has the burden of showing error. *McAllister v. McAllister,* 101 S.W.3d 287, 291 (Mo. App. 2003).

E.P. has not preserved for review her claim that RSMo §453.030.7 and the consent form are unconstitutional on due process grounds.

E.P. raises for the first time in her Substitute Brief the claim that RSMo § 453.030.7 and the consent form denied her due process of law. She claims now, for the first time, that because the statute and the consent form do not include instructions as to how the consent can be withdrawn, that her due process rights were violated.

E.P. is barred from asserting this claim at this point in this proceeding. This Court recently held that "[t]o preserve a constitutional question for review in this Court, it must be raised at the earliest opportunity; the relevant sections of the Constitution must be specified; the point must be preserved in the motion for new trial, if any; and, it must be adequately covered in the briefs." *In the Interest of*

H.L.L., 179 S.W.3d 894, 897 (Mo. banc 2005). Appellants may not assert new points of error when the case is transferred to this Court. *Dupree v. Zenith Goldine Pharmaceuticals, Inc.,* 63 S.W.3d 220, 222 (Mo. banc 2002), see also Rule 83.08(b).

E.P. had ample opportunity to timely raise her claim of denial of due process but failed to do so[1]. She did not raise this issue before the trial court in her amended motion to withdraw her consent (LF 39). She did not raise this issue in her first motion for rehearing. (LF 51). She did not raise this issue in the first appeal. She did not raise this issue when the case was remanded to the trial court. She did not raise this issue in her second motion for rehearing (SLF 21). She did not raise this issue before the Court of Appeals on the second appeal. The litigation in this case has been going on for almost two years. There have been two appeals in this case. E.P. is barred from asserting that the statute and the consent form denied her due process.

E.P. lacks standing to challenge RSMo §453.030.7 and the consent form on the

[1]E.P. did raise the issue that neither the statute nor the consent form give instructions as to how a consent must be withdrawn but she did not claim that this denied her due process.

theory that they deny a birth parent due process because their application to her did not result in a denial of any due process rights she might have.

Even if this Court chooses to consider E.P.'s claim that RSMo §453.030.7 and the consent form she signed violate due process, the record before the Court illustrates that E.P. lacks standing to raise this claim because she was afforded ample due process.

A party has standing to challenge the constitutionality of a statute (or a rule or directive) only insofar as it has an adverse impact on the party's own rights. *R.J.J. v. Shineman*, 658 S.W.2d 910, 914 (Mo. App. 1983). The general rule is that if there is no constitutional defect in the application of a statute to a litigant, the litigant does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. *Id.* at 914. "The rule is well settled that a person may not urge the unconstitutionality of a statute in the absence of showing injury. A person may question the constitutionality of a statute only when it is applied to his disadvantage." *Miller v. Police Retirement System of St. Louis*, 296 S.W.2d 78, 79-80 (Mo. 1956).

Applying these principles to this case, it is clear that E.P. was not denied due process in these proceedings. Although born in Guatemala, E.P. had resided in the United States for over six years at the time she gave her consent to the adoption.

(TR 235). She was 29 years old, had a job, was raising a son, had a driver's license and a car, and was renting an apartment. (LF 4, 7, 9; TR 155-156; 291-292; 297-298). She was capable of meeting her needs and her son's and was functioning well as an adult in the United States. (SLF 8).

E.P. worked closely with the adoption agency in making the adoption plan for her child. She was told by the agency social worker that she would need an attorney. The social worker told her that she could find her own attorney or the agency would provide one for her, and that either way, the attorneys fees would be paid for by the agency. (TR 109-110).

E.P. chose to work with the attorney provided by the agency. E.P. was never told she could not have a Spanish speaking attorney (TR 110). E.P. met with her attorney, Kevin Kenney, more than 48 hours after the baby's birth. An interpreter, Ms. Wilbers, was present at all times during her meeting with her attorney. (TR 220-221). Ms. Wilbers explained to E.P. that Mr. Kenney was her "abogado", which is the term commonly used for lawyer or attorney in Spanish. (TR 228, 250). The consent form was read to E.P. in Spanish. She was asked if she understood the consent form and she said she did. (TR 222, 252). Mr. Kenney gave E.P. his business card and told her, through the interpreter, that she should call the

interpreter if she wanted to speak with him (TR 94, 214, 220). The interpreter also provided her contact information to E.P. and told E.P. to contact her if she wanted to speak with Mr. Kenney (TR 195, 220).

E.P. appeared in court one week later at her consent hearing[2]. An interpreter was present during the hearing (TR 2). As was stated by the Court of Appeals, the hearing before the Commissioner was extremely thorough and provided a substantial procedural protection for E.P. *In Re Baby Girl P.*, 2006 WL 8440 (Mo. App. 2006). Both E.P.'s attorney and the Commissioner repeatedly questioned E.P. about her understanding regarding the consent, and she repeatedly stated that she understood what she was doing. The Commissioner asked E.P. if she wanted the consent form to be translated in writing into Spanish and she said no. (TR 13). The Commissioner asked E.P. is she wanted an attorney who spoke Spanish and that the court would find her one, if she desired. E.P. declined this offer. She stated she could communicate fine with Mr. Kenney. (TR 14).

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[2]As the Court of Appeals correctly noted, a hearing is not required by statute but is the long standing practice in Jackson County. The hearings are held on Friday mornings before a Commissioner, who initially rules on the consent and forwards the recommendations to the Family Court Judge.

The Commissioner specifically informed E.P. that her consent to the adoption was not yet final. He told her that she could have more time to think about her decision. He informed her that even though she had signed the consent, she was not bound by it and could still change her mind. He asked her several times if she wanted to withdraw her consent or take it back. Each time E.P. responded that she wanted her consent to be accepted. (TR 13-17). The Commissioner told E.P. that she was not bound by the consent until he accepted it and it was accepted by another judge. (TR 16). The Commissioner informed her that there was a possibility that the child might not be placed with the couple she selected. E.P. stated that she was OK with that, as long as the couple wasn't an African-American or an Arab couple. The Commissioner asked E.P. if she had any questions. He offered to have her attorney and the social worker leave the courtroom. E.P. said she did not want them to leave and that she did not have any questions for the Commissioner. (TR 16-17). At the conclusion of the hearing, the Commissioner accepted and approved E.P.'s consent.

These facts illustrate that E.P. was afforded numerous substantial procedural protections and that she was not denied due process. She had her own, independent legal counsel. She was provided with information as to how to get in touch with her

attorney. She declined the offer to have a written translation of the consent. She was offered to have the consent form translated into Spanish. She declined the offer to have a Spanish speaking attorney appointed for her. She was provided with an interpreter at all relevant times.

E.P. was provided with numerous procedural protections in this case. E.P. lacks standing to raise a due process claim. She was not adversely impacted because she was provided with due process protections. Her claim of denial of due process fails.

2. The trial court correctly denied E.P.'s amended motion to withdraw her consent because E.P. did not timely withdraw her consent in writing in that E.P. did not provide written notice of her alleged withdrawal of her consent until well after her consent was reviewed and accepted by an Article V judge.

Standard of Review

Article V, §10 of the Missouri Constitution requires the Missouri Supreme Court to hear a case transferred from the Court of Appeals after opinion the same as though on original appeal.

In a court-tried case, the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the

evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32(Mo. 1976). In a court-tried case, the trial court's decision is presumed correct and the appellant has the burden of showing error. *McAllister v. McAllister,* 101 S.W.3d 287, 291 (Mo. App. 2003). The Missouri Adoption Code requires that a withdrawal of a consent to the adoption of a child must be in writing.

The trial court, in its original judgment, held that E.P.'s failure to timely file or execute a withdrawal of consent prior to the entry of the judgment accepting her consent was not excused by any fraud, mistake, coercion, misrepresentation, duress, duress by force of circumstances or any other conduct. (LF 2). The Western District Court of Appeals, in the first appeal in this case, ruled that the trial court erred in requiring that a withdrawal of consent be in writing. *In Re Baby Girl P.,* 159 S.W.3d 862, 865 (Mo. App. 2005). This ruling must be re-examined. If allowed to remain the law in Missouri, it will jeopardize the stability and welfare of children already adopted and children to be adopted in the future in this state. To allow a biological parent to orally withdraw the consent to the adoption is contrary to the Missouri Adoption Code and to the policy behind it, which is to promote the stability and welfare of adopted children in Missouri.

The Missouri Adoption Code

Chapter 453 of the Missouri statutes constitutes the Missouri Adoption code. An examination of these numerous statutory sections illustrates that nowhere in these statutes does it provide that any action can be taken "orally." RSMo §453.026 requires that a **written** report regarding the child be furnished to the court and all parties to the proceeding. RSMo §453.070 requires that a **written** assessment of the adoptive parents be completed. RSMo §453.075 requires a **written** accounting be filed of anything that has been paid or transferred by on behalf of the petitioners in connection with the adoption. RSMo §453.077 requires a **written** post placement assessment.

RSMo §453.030 repeatedly refers to the **written** consents that are required in an adoption. RSMo §453.030.3 requires that the **written** consent of the mother, the presumed father, and a putative father (who meets certain conditions) are required. RSMo §453.030.2 requires the **written** consent of the person to be adopted if that person is fourteen years old or older.

The statute in question, RSMo §453.030.7 provides that "[t]he written consent required in subsection 3 of this section may be withdrawn anytime until it has been reviewed and accepted by a judge." This statute must be construed together with the other sections of the adoption code. Missouri courts have long

held that the various sections of the Missouri adoption statutes must be construed together in accordance with the manifest intention of the legislature. *In re Adoption of Davis*, 285 S.W.2d 35, 36 (Mo. App. 1955). Missouri courts, including this Court, state that "an aid in ascertaining legislative intent is the rule that the entire act must be construed together and all provisions must be harmonized." *Emincence R-1 Sch. Dist. v. Hodge*, 635 S.W.2d 10, 13 (Mo. 1982). "It is fundamental that a section of a statute should not be read in isolation from the context of the whole act." *State v. Meggs,* 950 S.W.2d 608, 610 (Mo. App. 1997). The court "must not be guided by a single sentence..., but [should] look to the provisions of the whole law, and its object and policy." *Ferrell Mobile Homes, Inc. v. Holloway*, 954 S.W.2d 712, 715 (Mo. App. 1997).

Chapter 453 is replete with requirements that certain actions be taken in writing. RSMo §453.030 requires that the consent to the adoption be in writing and construing this section as a whole, it follows that the withdrawal of the consent referred to in RSMo §453.030.7 must also be in writing.

Other than the two appellate court decisions in this case, only one other Missouri case addresses the issue of whether a biological parent timely withdrew the consent to the adoption prior to its acceptance by an Article V judge. In that

case, *In the Interest of K.L.S.*, 119 S.W.3d 548 (Mo. App. 2003), the biological parent filed a **written** motion with the court prior to the acceptance of her consent by the Article V judge. 119 S.W.3d at 550. The *K.L.S.* court ruled that the biological parent's withdrawal of her consent was effective because she filed a written motion withdrawing her consent prior to its acceptance by the Article V judge. E.P. did not file her written motion to withdraw her consent until ten (10) days after her consent was accepted by the Article V judge. At that point, she was beyond the time she could withdraw her consent under RSMo Sec. 453.030.7.

It does not appear that any other state allows a biological parent to orally withdraw a written consent to an adoption. E.P. has relied on a Maryland case throughout these proceedings to support her claim that an oral withdrawal of a consent to an adoption is sufficient. Her reliance on this case, *In re Adoption/Guardianship No. 11137*, 664 A.2d 443 (Md. Ct. App. 1995) is misplaced and unpersuasive.

In the Maryland case, the prospective adoptive parents were the parents of the biological mother. After signing her consent, the biological mother allegedly told her father that she was going to try to have it overturned. 664 A.2d at 445. The consent was obtained by her parents without notifying her that they had filed an adoption proceeding. The biological mother was only informed of the adoption

proceeding the night before the hearing. She appeared at the hearing pro se. She immediately informed the court that she objected to the adoption and asked the trial court to declare that her consent to the adoption was revoked. 664 A.2d at 446.

The Maryland Court of Appeals held that the biological mother did effectively withdraw her consent, based on the "totality of the facts of this case." 664 A.2d at 453. The court's holding is based on: (1) the complete lack of notice to the biological mother that the adoption action was proceeding in court; (2) the biological mother was not represented by counsel when she signed her consent; and (3) the biological mother, when she did appear in court, immediately informed the court that she was revoking her consent. The court emphasized that the biological mother expressed to her father, *the only person, as far as she knew or could have known, who was involved in the matter,* her desire to revoke her consent. 664 A.2d at 449.

The facts of the instant case differ greatly from those of the Maryland case. E.P. had actual notice there was a court proceeding regarding the adoption. E.P. was represented by her own attorney, at the time she signed the consent and when she appeared in court. E.P., unlike the biological mother in the Maryland case, informed the court that she was consenting to the adoption and wanted the court to

accept her consent. E.P. also knew that it was not just the adoption agency that was involved in the adoption process. She knew that her attorney, the interpreter and the trial court were involved. E.P.'s alleged oral notification to the adoption agency of her intent to withdraw her consent was completely ineffective and invalid.

RSMo §453.005.1 provides that "the provisions of sections 453.005 to 453.400 shall be construed so as to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home." To further this legislative object and policy, it must be determined that a withdrawal of a consent to an adoption must be written, just as the consent to the adoption is required to be in writing. To hold otherwise will create instability and uncertainty for all children previously adopted in Missouri and those who are to be adopted in the future. The Court of Appeals, by allowing oral withdrawals of consents before the consent is accepted by the Article V judge, creates a situation where a biological parent could withdraw the consent, even after it has been accepted by the Article V judge, if the biological parent successfully claims that he or she orally withdrew the consent before it was accepted by the judge. A biological parent could claim, even after the adoption is finalized, that he or she should be allowed to withdraw the consent because before it was accepted by the judge, the biological parent "orally" withdrew the consent. No adoption in the State

of Missouri would be certain or stable. This result certainly does not promote the goal of permanence and stability for the child.

This Court is urged to re-examine the law and hold that a withdrawal of a consent to the adoption of a child must be in writing.

3. The trial court correctly denied E.P.'s amended motion to withdraw her consent because extrajudicial notifications of withdrawal of consent are invalid in that E.P. submitted her written consent to the trial court so it had to be withdrawn from the trial court, not from the child-placing agency or any other third party.

Standard of Review

Article V, §10 of the Missouri Constitution requires the Missouri Supreme Court to hear a case transferred from the Court of Appeals after opinion the same as though on original appeal.

In a court-tried case, the judgment will be sustained unless it is not supported by substantial evidence, it is against the weight of the evidence, or the trial court erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *In re Adoption of H.M.C.*, 11 S.W.3d 81, 86 (Mo. App. 2000). In a court-tried case, the trial court's decision is presumed correct and the appellant has

the burden of showing error. *McAllister v. McAllister*, 101 S.W. 3d 287, 291 (Mo. Ct. App. 2003).

Extrajudicial notifications of withdrawal of consent to adoption are invalid and insufficient notice of a biological parent's withdrawal of consent.

The trial court found that in this case, even if notification to the adoption agency of withdrawal of the consent was sufficient notice, there was no credible evidence that E.P. communicated her withdrawal to the agency before her consent was accepted by the family court judge. (LF 8). This finding was upheld by the Court of Appeals when it ruled that the determination that E.P. did not orally withdraw her consent before it was accepted by the Article V judge was supported by substantial evidence and not against the weight of the evidence. *In Re Baby Girl P.,* 2006 WL 8440 (Mo. App. 2006). Art and Lisa argued before the trial court and the Court of Appeals that notification of withdrawal of consent must be timely communicated to the court, not just to the adoption agency, the adoptive parents or some other party or entity. To whom the withdrawal of consent must be effectively communicated is a matter of general importance in this state. This Court is urged to re-examine this issue and find that withdrawals of consent to adoption must be timely communicated to the court, especially when, as in this case, the biological parent not only signed a written consent but appeared in court and orally requested

that the court accept her consent.

RSMo §453.030.7 provides that the consent may be "withdrawn" at any time before it is reviewed and accepted by a judge. The consent is required by RSMo §453.030.3 to be in writing. "Withdrawn" is not defined in the statute. "Withdraw" is defined by *Black's Law Dictionary* (8th ed. 2004) to mean "to take back (something presented, granted, enjoyed, possessed or allowed). The noun "withdrawal" is defined as "the act of taking back or away; removal. *Black's Law Dictionary* (8th ed. 2004). In the context of the statute, "withdrawn" logically means to take back something presented - the consent. E.P. submitted her written consent, and her oral request that the consent be accepted, to the trial court when she appeared in court at her consent hearing. As such, to "withdraw" the consent, E.P. was required to take back, or remove it, from the trial court. E.P. did not give her consent to the adoption agency. She did not give her consent to Iberty Gedeon, the bilingual therapist hired by the adoption agency. E.P. did not give her consent to Judith Abissab, the teacher at her son's school. E.P. submitted her consent to the trial court. She could not "withdraw" or "take back" her consent from entities or individuals to whom she did not give her consent. To be an effective withdrawal of consent, E.P. was required to timely withdraw the consent from the trial court and

she failed to do so.

There is a line of cases in the State of Oregon which hold that if an adoption proceeding has begun, a parent cannot withdraw the consent by mere extrajudicial notification to the adoptive parents. These cases provide that some form of notice of withdrawal of the consent must be provided to the court. In these cases, the courts found that sufficient notice was provided to the court of the withdrawal of the consent because some form of written notice was provided to the court. In *In the Matter of Lauless,* 216 Or. 188, 338 P.2d 660 (1959), the court found that sufficient notice of the withdrawal of the consent was provided to the court in the caseworker's report, which was filed with the court. In *Stubbs v. Weathersby*, 320 Or. 620, 892 P.2d 991, 999 (1995), the court found that the withdrawal of the consent was sufficient because the biological mother sent a letter to the court stating that she no longer consented to the adoption. In *McCulley v. Bone,* 160 Or. App. 24, 979 P.2d 779, 784 (1999), the court noted that written notice of the withdrawal of the consent was provided to the court in the placement report that was filed with the court the day before the entry of the adoption decree.

These sound principles should be applied in this case. Once the adoption proceeding began, and E.P. submitted her consent to the trial court, she was required to withdraw her consent from the trial court. This is especially true in this

case because E.P. had actual notice that the adoption proceeding had begun. She appeared in court and testified before the commissioner so she was clearly on notice that the adoption was proceeding through the court.

The case principally relied on by E.P. to support her claim that she was not required to notify the court of the withdrawal of her consent is factually distinct in several important ways. The biological mother in *In Re Adoption/Guardianship No. 11137, In the Circuit Court for Montgomery County,* 106 Md. App. 308, 664 A.2d 443 (1995) had no notice that the adoption proceeding was pending in the court. The Maryland court emphasized that the biological mother expressed to her father, *the only person, as far as she knew or could have known, who was involved in the matter,* her desire to revoke her consent. 664 A.2d at 449 (emphasis added). Also, the biological mother in that case was not represented by her own attorney, as E.P. was in the instant case. When the biological mother learned at the eleventh hour that there was a court proceeding regarding the adoption, she appeared in court and told the court that she wanted to withdraw her consent. 664 A.2d at 453. By stark contrast, when E.P. appeared in court, she repeatedly and consistently told the court that she wanted the court to accept her consent to the adoption.

Similarly, in *McCulley v. Bone,* 160 Or. App. 24, 979 P.2d 779, 784 (1999),

the court emphasized that the biological mother "was never provided with even minimal notice sufficient to advise her of the pendency of the action and to afford her an opportunity to appear." 979 P.2d at 793.

E.P. claims that she gave sufficient notice of withdrawal of her consent because she allegedly communicated the withdrawal to the adoption agency. (see Appellant's Substitute Brief, pages 46-47, footnote 1). She cites to *Gruett v. Nesbitt,* 172 Or. App. 113, 17 P.3d 1090 (2001) for the proposition that her alleged notification to the agency also constituted notice to Art and Lisa because the agency was their agent. This case does not support E.P.'s claim. In *Gruett v. Nesbitt*, the adoptive parents had actual knowledge, prior to accepting custody of the child, that the biological father objected to the adoption. The court attributed the fraudulent acts of the agency to the adoptive parents because they were aware of the biological parent's objection before the child was placed with them. Additionally, the record in that case contained the written agreements between the adoption agency and the adoptive parents, so the court was able to determine the agency relationship.

In this case, there is not one scintilla of evidence that Art and Lisa had any knowledge of E.P.'s alleged attempts to orally withdraw her consent during the time period in question. Also, the record does not contain any written agreements between Art and Lisa and the adoption agency.

The evidence is undisputed that E.P. did not notify the trial court of her alleged desire to withdraw her consent before her consent was accepted by the Article V judge. Furthermore, E.P. did not contact nor did she attempt to contact her attorney, Kevin Kenney, during this time period, despite having the ability to get in touch with him through the interpreter. (TR 219-220). Because E.P. failed to notify the trial court in a timely manner of her desire to withdraw her consent, the trial court's denial of her amended motion to withdraw her consent must be affirmed.

4. The trial court correctly denied E.P.'s amended motion to withdraw her consent because E.P. did not timely withdraw her consent in that E.P. failed to orally communicate a withdrawal of her consent under RSMo §453.030.7 before her consent was accepted and approved by the family court judge.

Standard of Review

In a court-tried case such as this, the judgment of the court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W. 2d 30, 32 (Mo. 1976). In a court-tried case,

the trial court's decision is presumed correct and the appellant has the burden of showing error. *McAllister v. McAllister*, 101 S.W.3d 287, 291 (Mo. App. 2003).

Credibility of witnesses and the weight to be given their testimony is a matter for the trial court, which is free to believe none, part or all of the testimony of any witness. *Milligan v. Helmstetter*, 15 S.W.3d 15, 21 (Mo. App. 2000). The trial court is in a better position than the appellate court to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles which are not revealed in a trial transcript. *McAllister v. McAllister*, 101 S.W.3d 287, 291 (Mo. App. 2003). The trial court may disbelieve testimony even when it is uncontradicted. *Id.* "The trial judge has absolute discretion as to the credibility of witnesses and the weight of their testimony is a matter for the trial court, and its findings on witness credibility are never reviewable by the appellate court". *Milligan*, 15 S.W.3d at 24; *see also Herbert v. Harl*, 757 S.W.2d 585 (Mo. 1988); *McAllister*, 101 S.W.3d at 291.

This court has stated that the trial court is in an especially advantageous position to determine the intent of a parent-witness in an adoption case. *In re Adoption of W.B.L*, 681 S.W.2d 452, 455 (Mo. banc 1984); *see also In Re Adoption of H.M.C.*, 11 S.W.3d 81, 87 (Mo. App. 2000).

In considering whether the judgment of the trial court is against the weight of

the evidence, an appellate court may exercise its power to set aside the judgment only with caution and only if it possesses a firm belief that the judgment is wrong. *Lewis v. Gibbons,* 80 S.W. 3d 461, 466 (Mo. banc 2002). In evaluating the weight of the evidence, the appellate court must recognize that the trial court was in a better position to have judged the credibility of the witnesses and to properly evaluate such evidence. *Id.*

The biological mother did not orally communicate a withdrawal of her consent to the adoption under RSMo §453.030.7 before her consent was accepted and approved by the family court judge.

If this Court determines that a biological parent can orally withdraw the consent to the adoption, the issue is whether E.P. effectively communicated an oral withdrawal of her consent, prior to the acceptance and approval of her consent by the family court judge. This was a factual determination to be made by the trial court. The trial court weighed all the evidence and determined that no substantial or credible evidence supported E.P.'s claim. The overwhelming weight of the substantial, competent and credible evidence presented at trial supports this determination.

The trial court heard evidence to support E.P.'s claim that she orally

withdrew her consent in a timely manner, and heard evidence to the contrary. The trial court carefully determined the credibility of each witness. The trial court's detailed findings are based on these credibility determinations. The trial court exercised its discretion in believing certain parts of a witnesses testimony and disbelieving other parts. In a case such as this, with emotions at a high level, these credibility determinations should be given great deference by this Court.

The only witness who testified that the biological mother orally communicated her desire to withdraw her consent, prior to its acceptance by the family court judge, was E.P. She testified that on June 19 and 21 she told Catherine Welch, of ABC (the adoption agency), that she wanted her baby back and wanted to know if the judge would give her baby back to her. (TR 273-274). Catherine Welch's testimony directly contradicted E.P.'s claim. Catherine Welch testified that E.P. did call her on June 19 but E.P. did not state that she had changed her mind about the adoption. Ms. Welch testified that during this phone conversation, E.P. was upset, said something about the baby and about E.P.'s brother being angry. (TR 129-131). Ms. Welch further testified that on June 21, her conversation with E.P. consisted only of explaining to her that a bilingual counselor would call her that afternoon. (TR 142).

Ms. Welch's testimony directly contradicted E.P.'s testimony. Catherine

Welch testified that E.P. never expressed to her that she wanted to withdraw her consent to the adoption. (TR 142). Ms. Welch further testified that in other adoption cases, she often hears from biological mothers after they appear at their consent hearings, who are upset and distraught, but do not indicate a desire to withdraw their consent to the adoption. (TR 150).

The trial court, after carefully considering this testimony and observing the witnesses, determined that E.P.'s testimony was not credible. The record supports this determination. E.P., by her own admission, had already lied repeatedly to the trial court during her consent hearing. (TR 259-260). The trial court was in the best position to observe E.P. during the trial on her amended motion. The trial court's determination that E.P. was not believable is a factual determination the trial court was entitled to make.

E.P. claimed throughout these proceedings that she is meek and shy and that she did not understand the legal implications of her actions. The trial court correctly found that the record belied these assertions. E.P. was twenty-nine years old at the time of the events in question. (TR 234). At the time of these events, she had lived in the United States for nearly six years. (TR 235). E.P. sought, obtained and followed proper prenatal care at a hospital clinic during her pregnancy. (TR

296-297).

She is also the mother of a five year old son from a previous relationship. E.P. is employed and supports herself and her son. (TR 155, 156, 286). She has seen to the proper enrollment of her son in school. (TR 297-298). She obtained a driver's license after passing a driver's test. (TR 292). She owns her own car, which she purchased. (TR 299). She drives her car and uses it to help meet her needs and get places. (TR 297). E.P. rented an apartment. (TR 291). E.P. does have some understanding of the English language. When asked by the trial court how much the babysitter for her son costs, E.P. responded in English, without waiting for the interpreter to translate. (TR 376).

E.P. sought to make an adoption plan for her child and sought out assistance in doing so. She selected Art and Lisa to adopt her baby, after rejecting another couple. (TR 19-21, 159-160). She clearly knew how to get these things accomplished and did so.

Based on this evidence regarding E.P. and the trial court's opportunity to hear her testimony and observe her, the trial court made the factual determination that she was not a credible witness. The trial court was free to disbelieve her and did so.

The trial court determined that Ms. Welch was credible. Again, the trial court was in the best position to judge the credibility and demeanor of each witness. Ms.

Welch consistently testified that E.P. did not express to her, any time from June 18-22, that she wanted to withdraw her consent to the adoption. The trial court can resolve any conflicts in the evidence in favor of one witness and against another, based on the trial court's opportunity to weigh and assess the credibility and demeanor of each witness.

The trial court also found Enedina Garza Wilbers to be credible. Ms. Wilbers was the interpreter present when E.P. met with her attorney Kevin Kenney, to sign the consent. Ms. Wilbers' testimony was that she did speak with E.P. on June 21, 2004. Ms. Wilbers testified that she and E.P. talked about the baby and that E.P. was upset, but E.P. never said that she wanted to withdraw her consent to the adoption. (TR 212, 217-218). Ms. Wilbers further testified that it was not until June 23, 2004, the day after the consent was accepted by the family court judge, that E.P. asked her to get in touch with Kevin Kenney. (Which was only for the purpose of obtaining a copy of her consent). (TR 219-220). The trial court believed Ms. Wilbers' testimony that the biological mother never said to her that she wanted to withdraw her consent.

Ms. Wilbers' testimony clearly contradicts the biological mother's claim that she did not understand that Kevin Kenney was her attorney. (See Substitute Brief

of Appellant, page 16, where E.P. states she "mistakenly, but understandably" did not believe Mr. Kenney was her attorney. This statement is argumentative and should be stricken from E.P.'s statement of facts). Ms. Wilbers testified that during the meeting with Kevin Kenney on June 11, 2004, she explained to E.P. that Kevin Kenney was her "abogado", which is the main word for attorney in Spanish. (TR 228). Ms. Wilbers further testified that Kevin Kenney told E.P. to call Ms. Wilbers if she wanted to speak with him, and that Mr. Kenney provided his contact information and that of Ms. Wilbers to E.P. (TR 94, 195, 214, 220).

E.P. misstates Ms. Wilbers' testimony in her Substitute Brief. Ms. Wilbers did not testify, as E.P. claims, that E.P. said to Ms. Wilbers "how can I get my baby back." (Substitute Brief of Appellant, page 39). Ms. Wilbers' testified that E.P. asked her "how can I get my baby...". (TR 230-231). The sentence is not completed. This simply cannot be construed as a clear statement by E.P. that she wanted to withdraw her consent. Ms. Wilbers' testimony was that E.P. never asked her to help her "get her baby back" and never told her she wanted to withdraw her consent. (TR 212; 217-218).

The trial court also specifically found not credible the testimony of Iberty Gedeon, the bilingual therapist. Ms. Gedeon contradicted herself more than once during her testimony. She was confused as to the dates conversations took place and

the content of those conversations. Ms. Gedeon testified that sometime in the afternoon of June 21, 2004, E.P. stated one time, in a telephone conversation, that she wanted her baby back. (TR 63). The trial court found that this testimony was not credible. The trial court simply did not believe Ms. Gedeon. This determination of the witness's credibility is well within the discretion granted to the trial court.

Moreover, the trial court found that even if said statement was made by E.P., it was insubstantial, based on the entire record before the court. The trial court has presided over hundreds of hearings regarding a biological mother's consent to an adoption of her child. Based on that experience and knowledge, the trial court is aware that a biological mother's expression that she wants her baby back is not the same as an unequivocal withdrawal of her consent to the adoption. "I want my baby back" is a vague and ambiguous statement. It can reasonably be interpreted as an expression of sadness and grief regarding the decision to make an adoption plan for one's child. It is not a clear and unequivocal expression of a withdrawal of the consent to the adoption. Catherine Welch testified that it is common to hear from a biological mother who is upset and distraught, after having gone to court to consent to the adoption of her child. She further testified that based on her experience, this did not necessarily mean that the biological mother wanted to withdraw her consent

to the adoption.

The trial court also disbelieved Judith Abisaab. She worked at the school where E.P.'s son was a student. Ms. Abisaab was not associated with the court or the agency. She was just an acquaintance of E.P.'s. Again, it is within the trial court's discretion to determine a witness's credibility and to choose to believe all, part or none of a witness's testimony, even if uncontradicted.

E.P. asks this Court to ignore these well-settled principles of law. She cites to two cases to support her argument that the appellate court does not have to give any deference to the trial court's determinations of witness credibility. These cases are distinguishable. The court in *Epperson v. Director of Revenue*, 841 S.W.2d 252, 255 (Mo. App. 1992) stated that an appellate court need not defer to the trial court's credibility determinations when the disputed question is not a matter of direct contradictions by different witnesses. As the Court of Appeals correctly noted, whether E.P. orally communicated an intent to withdraw her consent was directly contradicted by other witnesses, namely Ms. Welch and Ms. Wilbers. 2006 WL 8440, page 3. Both Ms. Welch and Ms. Wilbers testified that E.P. did not state that she wanted to withdraw her consent to the adoption. (TR 192-193); 212, 217-218). The trial court expressly found Ms. Welch and Ms. Wilbers credible and found E.P. and Ms. Gedeon not credible. The Court of Appeals correctly held that these

credibility determinations cannot be ignored. 2006 WL 8440, page 3.

The other case E.P. cites to, *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 604 (Mo. App. 1999) is also distinguishable. In that case, there was no conflicting evidence before the court. In the present case, there was conflicting evidence. Both Ms. Welch and Ms. Wilbers testified that at no time did E.P. express to them that she wanted to withdraw her consent to the adoption. This testimony directly contradicted E.P.'s testimony that she did express to them her desire to withdraw her consent. *Epperson* and *Sanderson* are inapplicable.

E.P. relies on the Maryland case, *In Re Adoption/Guardianship No. 11137, In the Circuit Court for Montgomery County*, 106 Md. App. 308, 664 A. 2d 443 (Md. App. 1995) to support her claim that she timely and effectively orally withdrew her consent, but her reliance is misplaced.

In Re Adoption/Guardianship No. 11137, In the Circuit Court for Montgomery County, 106 Md. App. 308, 664 A. 2d 443 (Md. App. 1995) differs from the instant case in several crucial respects. In the Maryland case, the biological mother's consent was obtained without first providing notice to her that an adoption proceeding had begun. E.P. was aware that an adoption proceeding was in place because she was the one who instigated this voluntary adoption proceeding. The

biological mother in the Maryland case was informed of the adoption proceedings on the night before the hearing. *Id.* She appeared at the hearing pro se. She immediately informed the court, at this first opportunity for her to appear before the court, that she "objected to the adoption and asked the trial court to declare her consent to have been revoked." *Id.* at 446.

By stark contrast, E.P., at her court appearance, did not inform the court that she objected to the adoption. E.P. did the opposite. E.P. repeatedly told the court that she understood the proceedings and wanted her consent to be accepted by the court. (TR 13-18).

The Maryland Court of Appeals ruled in favor of the biological mother, considering the "totality of the facts of this case." *Id.* at 453. The Maryland court's holding is based on the complete lack of notice to the biological mother that an adoption action had been filed and was proceeding through the court. Also, the biological mother in the Maryland case was not represented by her own attorney at the time she signed the consent, unlike E.P. E.P. had her own attorney when she signed the consent and when she appeared in court. Additionally, the Maryland court's holding is based on the biological mother's appearance in court and notification to the court that she wished to withdraw her consent and that she objected to the adoption. E.P., when she appeared in court, asked the court to accept

her consent. E.P. gave no indication whatsoever to the trial court that she wanted to withdraw her consent.

The Maryland court emphasized that the biological mother expressed to her father, *the only person, as far as she knew or could have known, who was involved in the matter,* her desire to revoke her consent. 664 A. 2d at 449. (emphasis added). E.P. knew that it was not just ABC that was involved with the adoption process. She knew Kevin Kenney, Ms. Wilbers and the trial court were involved, too. The Maryland court's holding that the biological mother's oral revocation of her consent was effective is based on several crucial factors that are noticeably absent in the instant case.

E.P. also cites to *In the Interest of A.N.M.*, 517 S.E.2d 548 (Ga. App. 1999) but this case is unpersuasive. *A.N.M.* involved an involuntary termination of parental rights proceeding. The biological parents signed written surrenders of their parental rights. Subsequent to that and within the time provided under Georgia law, the biological mother's attorney sent a **written** letter withdrawing the surrender of parental rights. The dispute involved whether the written notice was delivered in person or by registered mail. The Georgia court held the **written** withdrawal was effective despite the failure to deliver it in the correct manner because the correct

party received timely notice.

A.N.M. is not applicable to this case. A written notice of withdrawal of the surrender was provided in *A.N.M.*, unlike in this case. Also, the state was trying to terminate the biological mother's rights in *A.N.M.* By contrast, E.P. voluntarily asked the court to terminate her parental rights and accept her consent.

The weight of the substantial, credible evidence presented at trial establishes that the biological mother did not effectively communicate an oral withdrawal of her consent to the adoption under §453.030.7, prior to the acceptance of her consent by the family court judge. This was a factual determination the trial court, as the trier of fact, had the discretion to make, after its careful review of the testimony and its opportunity to assess and observe each and every witness during trial. The trial court's decision should be affirmed.

5. The trial court correctly denied E.P.'s amended motion to withdraw her consent because the substantial, credible evidence before the trial court established that E.P.'s consent was given free of duress and not due to duress by "force of circumstances" in that E.P. was provided with numerous procedural protections throughout the process, including the assistance of an interpreter, independent legal counsel, and a hearing before the trial court where she testified that she understood the proceedings, understood the

consent and the consequences thereof, declined to have a Spanish speaking attorney or to have the consent document translated in writing, and wanted the Court to accept her consent.

Standard of Review

In a court-tried case such as this, the judgment of the court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W. 2d 30, 32 (Mo. 1976). In a court-tried case, the trial court's decision is presumed correct and the appellant has the burden of showing error. *McAllister v. McAllister*, 101 S.W.3d 287, 291 (Mo. App. 2003).

Credibility of witnesses and the weight to be given their testimony is a matter for the trial court, which is free to believe none, part or all of the testimony of any witness. *Milligan v. Helmstetter*, 15 S.W.3d 15, 21 (Mo. App. 2000). The trial court is in a better position than the appellate court to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles which are not revealed in a trial transcript. *McAllister v. McAllister*, 101 S.W.3d 287, 291 (Mo. App. 2003). The trial court may disbelieve testimony even when it is uncontradicted. *Id.* "The trial judge has absolute discretion as to the credibility of

witnesses and the weight of their testimony is a matter for the trial court, and its findings on witness credibility are never reviewable by the appellate court." *Milligan*, 15 S.W.3d at 24; *see also Herbert v. Harl*, 757 S.W.2d 585 (Mo. 1988); *McAllister*, 101 S.W.3d at 291.

This Court has stated that the trial court is in an especially advantageous position to determine the intent of a parent-witness in an adoption case. *In re Adoption of W.B.L*, 681 S.W.2d 452, 455 (Mo. banc 1984); *see also In re Adoption of H.M.C.*, 11 S.W.3d 81, 87 (Mo. App. 2000).

In considering whether the judgment of the trial court is against the weight of the evidence, an appellate court may exercise its power to set aside the judgment only with caution and only if it possesses a firm belief that the judgment is wrong. *Lewis v. Gibbons,* 80 S.W. 3d 461, 466 (Mo. banc 2002). In evaluating the weight of the evidence, the appellate court must recognize that the trial court was in a better position to have judged the credibility of the witnesses and to properly evaluate such evidence. *Id.*

The substantial, credible evidence and the weight of the evidence before the trial court established that E.P.'s consent was not obtained while she was under duress or "duress by force of circumstances."

It is a well-established principle in Missouri that a trial court has the

discretion to deny a biological parent's motion to withdraw or revoke a consent. *See, e.g.*, *In Re K.L.S.*, 119 S.W. 3d 548, 550, fn. 7 (Mo. App. 2003).

Although each case must be decided on its facts, Missouri courts have repeatedly refused to allow a biological parent to withdraw her or his consent to an adoption, even when the biological parent argued that she or he did not understand what she or he was doing when the consent was signed. In *In re the Adoption of A.D.A.*, 789 S.W. 2d 842, 845 (Mo. App. 1990), the biological mother only had a seventh grade education and testified that she did not understand that she was consenting to have her parental rights terminated and to an adoption of her child. The Court refused to allow her to withdraw her consent to the adoption.

In *In Interest of D.C.C.*, 935 S.W. 2d 657 (Mo. App 1996) the Court found that the trial court properly denied the biological parents' request to revoke their previous consent to the adoption of their child based on "duress by force of circum6stances." *Id.* at 659. Though the biological parents failed to allege any grounds for granting their motion at the trial court level, the Court of Appeals considered their claims of duress by force of circumstances and found that the transcript "belie[d] their contention." *Id.* The court found that the biological parents' testimony before the trial court indicated "they had discussed the adoption and fully

understood the consequences of their decision." *Id.* Both of them acknowledged reading and understanding a consent form. *Id.* The biological mother, a twenty-two year old woman, also testified at the hearing that her consent was voluntary and had not been coerced or threatened, that she had discussed the matter with a counselor and that "she believed the adoption was in the child's best interests." *Id.* The biological father, a twenty-five year old, testified in similar fashion. *Id.*

On a second appeal, *In Interest of D.C.C.*, 971 S.W. 2d 843 (Mo. App. 1998), the biological parents alleged several grounds to appeal the trial court's denial of a second motion to revoke their consents to adoption. They again argued that they should have been allowed to revoke their consent based on "duress by force of circumstances." *Id.* at 846. The biological mother was alleged to be 'immature emotionally, suffering 'deep and severe humiliation,' and feared 'scandal, shame and unhappiness'. *Id.* The biological parents also suggested duress due to the biological mother's financial insecurity and the biological father's concern that his family would be opposed to the raising of the child by the birthparents. *Id.* The court again emphasized that the biological parents had testified, under oath at the hearing, "that they were acting voluntarily without coercion and that they believed that adoption was in their child's best interest." *Id.* Though the court granted remand for the trial court to consider other grounds of fraud and misrepresentation not considered by

the trial court initially, the court found that the trial court, given the sworn testimony of the biological parents, "did not abuse its discretion in rejecting, on its face, their motion to set aside the judgment on the ground of duress by force of circumstances." *Id.*

The record reflects that E.P. is a person of sufficient legal capacity who gave sworn testimony under oath that her plan to place her child for adoption was considered over a long period of time; that she wished to consent to the termination of her parental rights and the adoption of her child; that her prior written consent was knowingly and voluntarily given, that she had been given satisfactory assistance of an attorney and an interpreter; and that she was not subject to duress from threats or improper promises of payment of expenses.

At the time of the events in question, E.P. was twenty-nine years old. (LF 4, 7). Though E.P. testified she had a limited education, her actions and conduct indicate that she is fully capable of understanding and handling adult responsibilities and life in the United States. At the time of her pregnancy and birth of the child, she had spent nearly six years living in the United States. (TR 235). She is also the parent of a five year old son from a previous relationship. (LF 9). She has employment and supports herself and her son. (TR 155, 156, 196, and 286).

She enrolled her son in school. (TR 297-298). She was able to secure the rental of an apartment. (TR 291). She obtained a driver's license after passing a driver's test. (TR 292). E.P. owns her own car, which she purchased at an auction. (TR 299). She drives her car and uses it to help meet her needs and get places. (TR 297). There is also evidence that E.P. has some understanding of the English language. When asked by the trial court how much her babysitter for her son costs, E.P. responded in English, without waiting for the interpreter to translate. (TR 376).

At her consent hearing before the trial court, E.P. testified that the termination of her parental rights and consent to adoption was what she wanted. (TR 4, 9-10, and 13). She gave her reasoning for wanting to terminate her parental rights and place the child for adoption as she did not want the baby with her. (TR 4). She testified that her decision to place the child for adoption occurred "from the moment I knew that I was pregnant and the father was not supporting me." (TR 4). She had not planned on having another child. (TR 236). She testified that she had not received any promises of payment of rent, utilities, car payments or any other monies from Art and Lisa. (LF 3; TR 11-12).

During the consent hearing, with the aid of an interpreter, the family court commissioner asked E.P. many questions to ascertain her understanding of the proceedings, her rights and her wishes regarding her rights. (TR 13-18). He asked

her if she wanted a written translation of the consent document that she had signed. (LF 3-5; TR 13). E.P. stated that she did not need a written translation of the consent. (TR 13).

The family court commissioner also asked E.P. if she wanted to consult an attorney who spoke Spanish. (TR 14). He told her that the court would find her an attorney who spoke Spanish if she desired. (TR 14). She testified that she did not want a Spanish-speaking attorney as she could communicate fine with her present attorney. (TR 14).

The family court commissioner advised E.P. that she could have more time to think about her decision. (TR 14). He informed her that even though she had signed the consent, she was not bound by it, and could change her mind. (TR 15). He asked her several times if he wanted her to accept the consent or if she wanted to take it back or withdraw it, and each and every time she responded that she wanted him to accept it. (TR 15-17; TR 21-22).

The family court commissioner advised E.P. that she was not bound by the Consent until he accepted it and another judge accepted the Consent. (TR 16). E.P. testified that she understood that, but still wanted him to accept her consent. (TR 16). The court advised her that there might even be a possibility that the couple she

selected to adopt the child, Art and Lisa, might not be allowed to adopt the child. (TR 16). E.P. asked why the Art and Lisa might not be approved as the adoptive couple. (TR 16). The Commissioner explained to her that the court had to act in the best interests of the child. (TR 16-17). She indicated she was okay with the possible selection of another adoptive couple "[a]s long as it's not a African-American couple or an Arab couple." (TR 17). E.P. testified that she understood the court proceedings and that she did not have any questions for the court. (TR 17-18; TR 21-22). She even voluntarily indicated at a point later in the proceedings that she was going against the wishes of her brother in placing the child for adoption. (TR 18).

The weight of the credible evidence presented to the trial court established that E.P. simply changed her mind after consenting to have her parental rights terminated and consenting to the adoption of the child, and that she failed to effectively communicate her change of mind in a timely manner. Case law in Missouri is clear that a "change of mind" is not a sufficient basis upon which a consent can be withdrawn. *In re Adoption of R.V.H*, 824 S.W. 2d 28, 30 (Mo. App. 1991); *In the Interest of A.M.K, et al.*, 723 S.W.2d 50, 53 (Mo. App. 1987).

In a similar case from another jurisdiction, a biological mother attempted to revoke her consent to adoption by claiming she was under "duress by force of

circumstances." In *Scott v. Pulley*, 705 S.W. 2d 666 (Tenn. App. 1986), the court rejected the biological mother's claim. The court relied heavily on the fact that she had signed a surrender and one month later appeared before the court at a "surrender hearing", where she informed the court she wanted the adoption to proceed. The court noted that the biological mother, at the surrender hearing, could have told the court that she did not want to surrender the child and that she wanted to keep the child. Instead, she told the court she thought it was both in her best interests and the child's that the child be surrendered for adoption. 705 S.W. 2d at 669.

Notably, the *Scott v. Pulley* court stated that "[t]here is little doubt that there is always "duress of circumstances" present causing a natural parent to consent to surrender and/or place for adoption that parent's child. However, as was said in *Barwin v. Reidy*, 62 N.M. 183, 307 P.2d 175 (1957), "What natural parent would ever consent to the adoption of his or her child in the absence of duress of circumstances." 705 S.W. 2d at 669.

E.P. attempts to explain away all of her previous affirmations of knowledge, consent and lack of duress by admitting that she lied to the court on June 18, 2004, but did not do so with the intent to deceive the Court. It is simply not relevant whether her lies were meant to deceive the court or not. The trial court found E.P.'s

testimony at the hearing on her amended motion not credible. The trial court was in an especially advantageous position to determine her intent. *In re Adoption of W.B.L*, 681 S.W.2d 452, 455 (Mo. banc 1984); *see also In re Adoption of H.M.C.*, 11 S.W.3d 81, 87 (Mo. App. 2000). E.P. admittedly lied to the trial court and the trial court was certainly entitled to consider this factor. Credibility of witnesses and the weight to be given their testimony is a matter for the trial court, which is free to believe none, part or all of the testimony of any witness. *Milligan v. Helmstetter*, 15 S.W.3d 15, 21 (Mo. App. 2000). The trial court is free to disbelieve any testimony, even if such testimony is uncontradicted. *Id.*

The trial court was well within its discretion to reject E.P.'s contention that her consent was given under duress by force of circumstances, given the totality of the credible evidence before the court. The trial court's decision should be affirmed.

6. The trial court correctly denied E.P.'s amended motion to withdraw her consent because the substantial, credible evidence established that E.P.'s consent to the adoption was not obtained through misrepresentation and "good cause" was not established to allow E.P. to withdraw her consent in that the trial court concluded there was no credible evidence that E.P. was subjected to any misrepresentation that prevented her from timely

withdrawing her consent and the credible evidence established that her consent was given knowingly, freely and voluntarily.

Standard of Review

In a court-tried case such as this, the judgment of the court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W. 2d 30, 32 (Mo. 1976). In a court-tried case, the trial court's decision is presumed correct and the appellant has the burden of showing error. *McAllister v. McAllister*, 101 S.W.3d 287, 291 (Mo. App. 2003).

Credibility of witnesses and the weight to be given their testimony is a matter for the trial court, which is free to believe none, part or all of the testimony of any witness. *Milligan v. Helmstetter*, 15 S.W.3d 15, 21 (Mo. App. 2000). The trial court is in a better position than the appellate court to judge factors such as credibility, sincerity, character of the witnesses, and other intangibles which are not revealed in a trial transcript. *McAllister v. McAllister*, 101 S.W.3d 287, 291 (Mo. App. 2003). The trial court may disbelieve testimony even when it is uncontradicted. *Id.* "The trial judge has absolute discretion as to the credibility of witnesses and the weight of their testimony is a matter for the trial court, and its

findings on witness credibility are never reviewable by the appellate court." *Milligan*, 15 S.W.3d at 24; *see also Herbert v. Harl*, 757 S.W.2d 585 (Mo. 1988); *McAllister*, 101 S.W.3d at 291.

This Court has stated that the trial court is in an especially advantageous position to determine the intent of a parent-witness in an adoption case. *In re Adoption of W.B.L*, 681 S.W.2d 452, 455 (Mo. banc 1984); *see also In re Adoption of H.M.C.*, 11 S.W.3d 81, 87 (Mo. App. 2000).

In considering whether the judgment of the trial court is against the weight of the evidence, an appellate court may exercise its power to set aside the judgment only with caution and only if it possesses a firm belief that the judgment is wrong. *Lewis v. Gibbons,* 80 S.W. 3d 461, 466 (Mo. banc 2002). In evaluating the weight of the evidence, the appellate court must recognize that the trial court was in a better position to have judged the credibility of the witnesses and to properly evaluate such evidence. *Id.*

The substantial, credible evidence established that E.P.'s consent was not obtained through misrepresentation or that she was not subjected to any misrepresentation that prevented her from timely withdrawing her consent because of any misrepresentations and there was no "good cause" to allow her to withdraw her consent.

E.P. claims that misrepresentations were made to her by the agency and by her attorney that wrongly led her to believe she could not withdraw her consent prior to the consent hearing, and that delayed her ability to timely withdraw her consent following the consent hearing. Conflicting evidence was presented to the trial court on these issues. The trial court found there was no credible evidence that E.P. was subjected to any misrepresentations regarding her consent. The trial court did not believe E.P.'s testimony nor did it believe the testimony of Ms. Gedeon, the bilingual therapist, or that of Judith Abisaab, the school employee. As the trier of fact, the trial court has leave to believe or disbelieve all, part or none of the testimony of any witness. Further, the appellate court will defer to the trial court on factual issues because the trial court is in a better position to judge a witnesses credibility, sincerity and other trial intangibles which may not be completely revealed by the record. *In re Adoption of H.M.C.*, 11 S.W. 3d 81, 87 (Mo. App. 2000).

Missouri courts have been faced with similar issues in other cases. In *In re the Adoption of A.D.A.*, 789 S.W. 2d 842, 845 (Mo. App. 1990), the court heard conflicting testimony regarding if the biological mother knew that the document she was signing was a consent to the adoption of her child. She testified that she did not

know it was a consent. She thought it was a document that just granted the adoptive parents temporary custody of the baby so they could care for the baby until the biological mother was ready to take her back. The adoptive parents testified that they explained to her that the document was a consent to an adoption of the child; that the consent was read to the biological mother and that she expressed she understood its contents; and that the notary asked the biological mother if she wanted to sign the consent and she said she was ready to do this. 789 S.W. 2d at 846. The trial court rejected the biological mother's testimony and found the consent to be a knowing, voluntary act, and that the biological mother had merely changed her mind.

Similarly, in *In re Adoption of R.V.H.*, 824 S.W. 2d 28 (Mo. App. 1991), the biological mother testified that she did not realize she was signing a consent to the adoption and that her parental rights would be terminated. The trial court heard conflicting testimony from other witnesses who testified that the consent was explained to the biological mother and that she expressed that she knew the adoption would terminate her parental rights. The trial court rejected the biological mother's testimony and found that her consent was valid and knowingly made. *Id.* at 30-31.

The trial court herein rejected E.P.'s testimony and other evidence that she

was misled as to the legal effects of her consent and the withdrawal of her consent. The trial court found credible Ms. Welch's testimony. She testified that at no time when she spoke with E.P. on June 19 and June 21 did she tell E.P. that it was too late and that she could not get her baby back. (TR 192). The trial court found Ms. Gedeon's testimony to be confusing and unreliable because she contradicted herself. Ms. Gedeon's testimony regarding what she told E.P. and when she told her is contradictory. She testified she told E.P. there was nothing she could do because the judge had signed; she also testified that she never told E.P. there was nothing more she could do. (TR 67, 71). The trial court found Ms. Gedeon not credible and disregarded her testimony. The trial court was completely within its discretion to do so and its resolution of these factual issues must be affirmed.

E.P. also attempts to establish "good cause" to allow the revocation of her consent to the adoption. She correctly notes that in *In Interest of D.C.C.*, 935 S.W. 2d 657 (Mo. App. 1997), the court stated that a trial court may allow the withdrawal of consent to adopt for good cause, and the biological parents bear the burden of proving good cause. The court further stated that in determining whether the parents have shown good cause, a trial court should consider the parent's legal capacity to give consent and whether the consent was induced by fraud or duress. *Id.* at 659.

Yet, as the Court of Appeals correctly noted, E.P. failed to cite to any Missouri case that found "good cause" to allow withdrawal of the adoption consent. 2006 WL 8440, page 4.

The overwhelming weight of the evidence demonstrated that E.P. gave her consent knowingly, freely and voluntarily. An interpreter was always present when she discussed her adoption plan with: the hospital social worker; the ABC adoption agency social worker; her attorney; and in court at her consent hearing. The record of the consent hearing speaks for itself. (TR 2-22; Respondents' Substitute Appendix 21-41). E.P. was repeatedly asked on June 18, 2004, by both her attorney and the family court commissioner, if she understood the proceedings, and she always answered yes. The family court commissioner asked her repeatedly if she understood that even though she had signed her consent, it was not final and she could withdraw it. She repeatedly answered that she understood. She was given every opportunity to withdraw her consent and she insisted that she wanted the court to accept her consent and she wanted the adoption to proceed. E.P. even interrupted the direct of examination of Catherine Welch at the June 18, 2004, hearing to reiterate her desire to have her parental rights terminated and have the child placed for adoption. (TR 18). E.P., after being advised of her right to withdraw her consent, stated that she still wished to proceed with the adoption and

the termination of her parental rights even though it went against the wishes of her adult brother. (TR 18).

At the hearing on her amended motion to withdraw her consent, E.P. testified that on June 21, 2004 she made no attempt to get in touch with her attorney, Kevin Kenney. (TR 275). On or before, June 22, 2004, she could have asked the interpreter, Ms. Wilbers, or Ms. Gedeon to help her contact her attorney or the court, but she failed to do so.

The substantial, credible evidence before the trial court indicated that E.P. decided many months prior to the child's birth that she wanted the child to be adopted. Her change of mind about the adoption is not grounds to support allowing her to withdraw her consent. As the court in *In Re the Adoption of R.V.H ,* 824 S.W. 2d 28, 31 (Mo. App. 1991) stated, "it is unfortunate the mother changed her mind. . . the mother's consent [was] valid, and was knowingly made although now regretted." The trial court's judgment should be affirmed.

7. The trial correctly denied E.P.'s amended motion to withdraw her consent because she did not establish any grounds to justify the withdrawal of her consent and it is not in the child's best interests to allow E.P. to withdraw her consent in that the child is entitled to stability and the denial of E.P's

motion promotes the goals set forth in RSMo §453.005(1).

Standard of Review

In a court-tried case such as this, the judgment of the court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W. 2d 30, 32 (Mo. 1976). In a court-tried case, the trial court's decision is presumed correct and the appellant has the burden of showing error. *McAllister v. McAllister*, 101 S.W.3d 287, 291 (Mo. App. 2003).

It is not in this child's best interests to allow E.P. to withdraw her knowing and voluntary consent to the child's adoption.

Missouri case law indicates that the court can consider whether the withdrawal of a biological parent's consent to an adoption of his or her child is in the child's best interests. In *In Interest of D.C.C.*, 971 S.W. 2d 843, 847 (Mo. App. 1998), this Court stated that "[w]hen the biological parents filed their second motion for leave to withdraw their consent, they averred fraud and misrepresentation which, **if true and if not overcome by other considerations such as the child's best interest**, would accord them relief." 971 S.W. 2d at 847 (emphasis added).

The court in *D.C.C.* emphasized that in considering whether grounds exist to allow the withdrawal of a biological parent's consent, the child's well-being and

welfare must be taken into consideration. The court noted that the child had been in the custody of the prospective adoptive parents for all but a few days of the child's life. The *D.C.C.* court emphasized that the issue was whether or not the child would be materially affected by the "change of condition wrought by the discontinuance of the existing situation." 971 S.W.2d at 847.

This Court stated in *In re Baby Girl*, 850 S.W. 2d 64, 70 (Mo. banc 1993), in considering the issue of whether the biological mother should be allowed to revoke her consent to the adoption of her child, that the trial court should "exercise its best judgment as to whether the best interest of this baby girl will be served by allowing her to remain with [the prospective adoptive parents], by returning her to [her natural parents], or by some other disposition".

Art and Lisa have established that E.P. failed to prove any valid ground upon which she should be permitted to withdraw her consent to the adoption. It is also not in the child's best interests to allow E.P. to withdraw her consent. The child was born on June 9, 2004. Nine days later she was placed in the temporary care and custody of Art and Lisa. She has lived with them in their home continuously since that date. She is now almost two years old. She has been cared for by Art and Lisa for all but nine days of her life. They are the only caregivers that she knows and

their home is the only home she knows.

Art and Lisa are a married couple who were selected by E.P. to adopt the child. (TR 159-160). They complied with her wishes both pre-birth and after the birth of the child, regarding when E.P. wanted to see them and when she wanted them to see the baby in the hospital. (TR 398-399; LF 7). They spoke with E.P. in the hospital and she never indicated that she was having any doubts about the adoption. They were present at the courthouse on June 18, 2004, the date of E.P.'s consent hearing, because their temporary custody hearing was scheduled to follow her hearing. When E.P. exited the courtroom, she saw Art and Lisa and waved to them. (TR 401-402). They accepted temporary custody of the baby and brought the baby into their home to love and care for her, based on the biological mother's voluntary, knowing actions and conduct in proceeding with the adoption. As the court stated in *In Re D*, 408 S.W. 2d 361, 368 (Mo. App. 1966), "[d]isregarding the investments of love and devotion made by would-be adopting parents could be as sinister as disregarding the welfare of the child."

The child is entitled to a permanent and stable home. There is great potential that a change of custody at this point in time would cause the child great trauma. E.P. failed to establish any ground on which she should be allowed to withdraw her consent. Moreover, it is simply not in this child's best interests to allow E.P. to

withdraw her consent to the adoption. The trial court's ruling should be affirmed.

CONCLUSION

The trial court's judgment must be affirmed. Respondents urge this Court to re-examine Missouri law and hold that a withdrawal of a consent to an adoption must be in writing. Respondents further urge this Court to re-examine Missouri law and hold that a written consent to an adoption that has been submitted to the trial court must be timely withdrawn from the trial court to be effective.

There is no dispute that E.P. did not file a written withdrawal of her consent prior to the entry of the judgment accepting and approving her consent. Even if this Court determines that a consent can be withdrawn orally, the overwhelming weight of the substantial, credible evidence presented to the trial court supports the trial court's judgment that E.P. failed to effectively withdraw her consent before the judgment was entered accepting her consent. This factual determination was made by the trial court, considering and weighing the testimony of each witness. Mo. Sup. Ct. R. 84.13(d)(2) requires the Court to give due regard to the opportunity of the trial court to have judged the credibility of the witnesses.

E.P. was afforded due process throughout the adoption process. She had counseling, her own attorney and an interpreter. She appeared in court and

repeatedly stated that she wanted her consent to be accepted. The Commissioner's questions to her and her responses speak for themselves:

COMMISSIONER ALLEN: Is this translated into written Spanish, or just oral Spanish? Just orally?

INTERPRETER: Orally.

COMMISSIONER ALLEN: Do you feel like you need a written translation of the consent?

THE WITNESS: No.

INTERPRETER: No. (TR 13)

COMMISSIONER ALLEN: You understand, Ms. P_____,that we could find a lawyer who does speak Spanish for you if you really wanted that? You understand that?

INTERPRETER: No, this is fine just like this.

COMMISSIONER ALLEN: So you feel like you have been able to communicate all right with Mr. Kenney?

THE WITNESS: Yes.

INTERPRETER: Yes. (TR 14)

COMMISSIONER ALLEN: Do you understand that even though you have already signed the consent, you're still not bound by it? You still aren't stuck

with it?

INTERPRETER: Yes.

COMMISSIONER ALLEN: Unlike a lot of legal documents, you're not bound by it until I actually accept it, and then some other judge accepts it, too. Do you understand that? Do you understand?

THE WITNESS: Yes.

INTERPRETER: Yes.

COMMISSIONER ALLEN: So--So do you want me to accept your consent, or do you want to take it back, which is your right?

INTERPRETER: I want you to accept it.

COMMISSIONER ALLEN: Okay. So I take it then you want me to accept it, and allow the child to be placed for adoption very quickly?

INTERPRETER: Yes. (TR 15-16)

For all the foregoing reasons, the judgment of the trial court must be affirmed.

Respectfully Submitted,

KRIGEL & KRIGEL, P.C.

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Sanford P. Krigel, MO #27382

4550 Belleview
Kansas City, Missouri 64111
skrigel@krigelandkrigel.com
Tel No. (816) 756-5800
Fax No. (816) 756-1999

_____

Karen S. Rosenberg, MO#33242
4550 Belleview
Kansas City, Missouri 64111
krosenberg@krigelandkrigel.com
Tel No. (816) 756-5800
Fax No. (816) 756-1999

ATTORNEYS FOR RESPONDENTS,
A.M. AND L.M.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Respondents' Substitute Brief complies with the limitations contained in Rule 84.06(c) and that there are 19,065 words, as determined by the Word Count of Microsoft Word, which was used to prepare this brief.

The undersigned further certifies that a floppy disk containing the brief was filed with the Clerk of the Court along with the original and ten copies of the brief, and an original and ten copies of the appendix and further certifies, pursuant to Rule 84.06(g), that the disk has been scanned for viruses and that it is virus-free.

Karen S. Rosenberg

CERTIFICATE OF SERVICE

The undersigned further certifies that a copy of the foregoing Respondents' Substitute Brief in written form, and a copy of the Appendix, and a floppy disk containing the brief were mailed, postage pre-paid, this ____ day of April, 2006, to each of the following:

Kim Carrington
P.O. Box 901244
Kansas City, MO 64114

ATTORNEY FOR E.P.
Jim Waits
Crews Waits Berger Brownlee & Hoop
401 W. 89th Street
Kansas City, Missouri 64114-3501

ATTORNEY FOR ADOPTION OF BABIES AND CHILDREN, INC

William O' Sullivan
1125 Grand, Suite 800
Kansas City, MO 64106-2501

GUARDIAN AD LITEM

Karen S. Rosenberg